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No.

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

IONIAN GLOW MARINE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether a private shipowner may collect contribution from the United States for damages paid to servicemen injured on active duty in a maritime collision.

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IONIAN GLOW MARINE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-4a) is reported at 670 F.2d 462. The opinion of the district court (App. B, *infra*, 5a-13a) is reported at 510 F. Supp. 196.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 14a-15a) was entered on January 26, 1982. On April 23, 1982, the Chief Justice extended the time for filing a petition for a writ of certiorari to June 25, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 1 of the Public Vessels Act, 46 U.S.C. 781, provides:

> A libel in personam in admiralty may be brought against the United States, or a petition impleading the United

States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided*, That the cause of action arose after the 6th day of April, 1920.

STATEMENT

1. On March 4, 1979, the M/V STAR LIGHT, a Greek flag cargo vessel owned by Ionian Glow Marine, Inc. ("Ionian Glow"), collided with the USS FRANCIS MARION, an amphibious attack transport of the United States Navy line commissioned as a surface combat vessel, off Cape Henry, Virginia (C.A. App. 37). [1] Both vessels were damaged, and three crew members on active duty aboard the USS FRANCIS MARION were injured (App. A, *infra*, 1a). On March 9, 1979, Ionian Glow filed a complaint in the United States District Court for the Eastern District of Virginia, seeking limitation of liability under 46 U.S.C. 181 *et seq.* (C.A. App. 1, 11-14). The government and the three injured servicemen then filed claims for damages arising out of the collision. Ionian Glow asserted a counterclaim under the Public Vessels Act, 46 U.S.C. 781 *et seq.*, against the United States and the FRANCIS MARION. It sought damages for the injury to its ship and contribution for any damages that might be assessed against Ionian Glow in favor of the three servicemen (C.A. App. 17-29). Before trial Ionian Glow settled the claims of the injured servicemen for a total of $700,000 (App. A, *infra*, 2a).

The United States and Ionian Glow agreed that the United States would pay 35% of Ionian Glow's provable damages and that Ionian Glow would pay 65% of those incurred by the United States, in accordance with the admiralty rule of apportioning damages arising out of collisions. The parties presented to the district court on cross-motions for partial summary judgment the question whether Ionian Glow's provable damages could include the $700,000 it paid to the three servicemen in settlement of their claims (App. B, *infra*, 5a). The govern-

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[1] "C.A. App." refers to the joint appendix in the court of appeals.

ment contended that its direct and indirect liability for injuries to servicemen on active duty was limited to compensation payable under the Veterans' Benefits Act, 38 U.S.C. 301 *et seq.* [2] See *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977); *Feres* v. *United States*, 340 U.S. 135 (1950).

2. The district court granted the government's motion for partial summary judgment (App. B, *infra*, 5a-13a). The court recognized that the Public Vessels Act, 46 U.S.C. 781 *et seq.*, waives the government's sovereign immunity for damages incurred by private parties in mutual fault collisions. But the court found that that waiver does not extend to claims against the United States by members of its armed forces (App. B, *infra*, 8a), just as the waiver of sovereign immunity in the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, does not extend to servicemen's claims. *Feres* v. *United States*, *supra*. See *Charland* v. *United States*, 615 F.2d 508 (9th Cir. 1980); *Beaucoudray* v. *United States*, 490 F.2d 86 (5th Cir. 1974). The district court found equally applicable in suits under the Public Vessels Act the corollary rule applied under the Federal Tort Claims Act—that the *Feres* doctrine also prohibits recovery of indemnity or contribution against the United States when a joint tortfeasor has paid damages to an injured service member. *Stencel Aero Engineering Corp.* v. *United States*, *supra*.

3. The court of appeals reversed (App. A, *infra*, 1a-4a). The court recognized that "if this * * * suit were in the form of an indemnity suit under the FTCA it would be barred * * * by the *Feres-Stencel Aero* doctrine" (*id.* at 2a). But because the litigation arose from a maritime collision, the court concluded that *Weyerhaeuser Steamship Co.* v. *United States*, 372 U.S.

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[2] Commander Robert Leary remained on active duty after the collision and, having received medical care for his injuries and drawn his normal salary, is not expected to receive any disability payments under the Act. The same is true of Chief Petty Officer Louis Colley, who retired with no disability. Lt. Commander Donald Miller, the most seriously injured of the three, is still on active duty pending a determination of his disability status and entitlements by a medical discharge evaluation board (App. B, *infra*, 5a n.1).

597 (1963), controlled the issue of the government's immunity. *Weyerhaeuser* held that the owner of a private vessel involved in a collision was entitled in admiralty law to contribution from the United States for damages paid to an injured civil servant, even though the Federal Employees' Compensation Act, 5 U.S.C. 8101 *et seq.*, was the employee's sole recourse against the United States. Though it did not address the policies underlying *Feres* and *Stencel Aero*, the court stated that it saw "[n]othing in [these decisions which] convinces us that the Supreme Court intended to alter the *Weyerhaeuser* rule. Until that Court expresses its intention to modify the rule in *Weyerhaeuser*, we are bound to follow it" (App. A, *infra*, 3a-4a).

REASONS FOR GRANTING THE PETITION

The United States has not waived its sovereign immunity to either direct or derivative claims for damages arising out of injuries to military personnel on active duty. The government's direct liability to injured service members is limited to the benefits afforded by the Veterans' Benefits Act, 38 U.S.C. 301 *et seq.*, a statutory no-fault compensation scheme. In *Stencel Aero Engineering Corp.* v. *United States*, *supra*, 431 U.S. at 673, quoting *Laird* v. *Nelms*, 406 U.S. 797, 802 (1972), this Court held that allowing a joint tort-feasor to recover from the United States any additional damages paid to a serviceman " 'would be to judicially admit at the back door that which has been legislatively turned away at the front door.' " The court of appeals' decision accepts that principle for the government's indirect liability to servicemen injured on land and in the air, but creates another rule for those injured at sea. This anomaly not only frustrates the purpose of the Veterans' Benefits Act, but also ignores the concerns voiced in *Stencel Aero*, 431 U.S. at 673, and *United States* v. *Brown*, 348 U.S. 110, 112 (1954), about judicial scrutiny of the relation between a serviceman and his superiors. The Court has recently reiterated that " '[i]t is difficult to conceive of an area of governmental activity in which the courts have less competence' " than military affairs or where the peculiar dynamics of discipline and decisionmaking are more " 'subtle' " and " 'complex.' " *Rostker* v. *Gold-*

berg, 453 U.S. 57, 65 (1981), quoting *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973). An action for indemnity such as that allowed by the court below presents the same threat to military discipline and decisionmaking as would a direct action by a serviceman against the United States.

The court of appeals' decision, although incorrect, is at least understandable in light of the tension that exists between this Court's holdings in *Feres* v. *United States*, *supra*, and *Stencel Aero*, on the one hand, and its decision in *Weyerhaeuser Steamship Co.* v. *United States*, *supra*, on the other. In general terms, these cases seem to direct different outcomes when the government is sued for indemnity or contribution because of injuries to a federal employee covered by a statutory compensation scheme. It is important for this Court to resolve that tension in the context of maritime collisions involving the military, which occur with some regularity and threaten the government with considerable monetary liability.

1. The considerations that underlie this Court's decisions in *Feres* and *Stencel Aero* make apparent that the government's liability for contribution or indemnity on account of injuries to its servicemen on active duty should not vary with the branch of service or the location of the injury. *Feres* v. *United States*, *supra*, rejected the right of soldiers in the Army to recover under the Federal Tort Claims Act (FTCA) for negligent medical treatment and unsafe quarters. Although the Court saw indications in the FTCA that such claims might be permitted, 340 U.S. at 138-139, it found more compelling an interpretation that would "fit * * * into the entire statutory system of remedies against the Government * * * " (*id.* at 139). One component of that structure was a congressionally established "system[] of simple, certain, and uniform compensation for injuries or death of those in the armed services," intended to provide exclusive recourse for injured or deceased service members and those suing on their behalf (*id.* at 144). The very fact that Congress made no effort in the FTCA to adjust "these two types of remedy * * * is persuasive that there was no awareness that the [FTCA] might be interpreted to permit recovery for injuries incident to military service" (*ibid.*). A

second factor was that the recognition of tort liability in this context would impermissibly disrupt the "peculiar and special relationship of the soldier to his superiors * * *." *United States* v. *Brown*, *supra*, 348 U.S. at 112; *Feres* v. *United States*, *supra*, 340 U.S. at 141-143. Third, the Court observed that recognition of tort actions by servicemen would subject their recovery to the vagaries of state law in a manner inconsistent with the uniquely federal relationship of the soldier to his government (*id.* at 143).

The same considerations were again decisive when this Court, in *Stencel Aero Engineering Corp.* v. *United States*, *supra*, rejected a joint tortfeasor's claim under the FTCA for indemnity after a National Guard pilot was injured on duty. Stencel Aero, a subcontractor, had manufactured the ejection system whose malfunction injured the pilot, and when sued by the pilot for negligence it cross-claimed against the United States. The Court concluded that such a third-party action "is unavailable for essentially the same reasons that the direct action * * * is barred by *Feres*." 431 U.S. at 673.

In this case Ionian Glow seeks to recover contribution under the Public Vessels Act, 46 U.S.C. 781 *et seq.*, for damages paid to crew members in the Navy. Like the FTCA, the Public Vessels Act is silent on the liability of the United States stemming from injuries to servicemen on active duty. It is clear, however, that just as in *Feres* no direct action against the government was permitted under the FTCA, so no direct action by a serviceman against the government is permitted under the Public Vessels Act. See *Johansen* v. *United States*, 343 U.S. 427, 440 (1952) (civilian crew on public vessels); *Charland* v. *United States*, 615 F.2d 508 (9th Cir. 1980); *Beaucoudray* v. *United States*, 490 F.2d 86 (5th Cir. 1974). See also *Dobson* v. *United States*, 27 F.2d 807, 808-809 (2d Cir. 1928), cert. denied, 278 U.S. 653 (1929). By the same token, the considerations crucial to the decisions in *Feres* and *Stencel Aero* preclude any indirect action against the United States under the Public Vessels Act as well.

a. One argument advanced in *Stencel Aero* was that *Feres*' emphasis on the exclusivity of the serviceman's compen-

sation remedy should not be extended to third parties who had no right to recover under the Veterans' Benefits Act. This Court responded (431 U.S. at 673; emphasis added; citations omitted):

> A compensation scheme such as the Veterans' Benefits Act serves a dual purpose: it not only provides a swift, efficient remedy for the injured serviceman, but it *also clothes the Government in the "protective mantle of the Act's limitation-of-liability provisions."* * * * Given the broad exposure of the Government, and the great variability in the potentially applicable tort law, * * * *the military compensation scheme provides an upper limit of liability for the Government as to service-connected injuries.* To permit petitioner's claim would circumvent this limitation, thereby frustrating one of the essential features of the Veterans' Benefits Act. As we stated in a somewhat different context * * *: *"To permit [petitioner] to proceed . . . here would be to judicially admit at the back door that which has been legislatively turned away at the front door.* We do not believe that the [Federal Tort Claims] Act permits such a result."

See also *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 464 (1980) (Veterans' Benefits Act is "the sole remedy [against the government] for service-connected injuries"). There is no reason to believe that the "limitation-of-liability provisions" of the Veterans' Benefits Act have any less force when contribution claims are asserted under the Public Vessels Act, rather than under the Federal Tort Claims Act. Nothing in the former statute suggests that maritime contribution claimants are more worthy of governmental concern than similar claimants under the FTCA. [3]

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[3] Indeed, a comparison of the facts in this case and *Stencel Aero* might suggest precisely the opposite. Stencel Aero alleged that its negligence was merely passive, and that the principal fault for the injury to the government's pilot lay with the United States. 431 U.S. at 668. In this case it was agreed that respondent bore the greater share of the fault (65%) for the collision that is the basis for its contribution claim.

b. The second of the factors relied on in *Stencel Aero* was the effect that allowing suits for indemnity or contribution could have on military discipline. Military service entails special requirements of discipline and order that contrast sharply with relationships among private citizens. See *Rostker* v. *Goldberg*, *supra*, 453 U.S. at 65-66; *Brown* v. *Glines*, 444 U.S. 348, 356-357 (1980); *Greer* v. *Spock*, 424 U.S. 828, 837-838 (1976); *Parker* v. *Levy*, 417 U.S. 733, 743-749 (1974); *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94 (1953). Crucial characteristics of that setting are "[v]igor and efficiency on the part of the officer and confidence among the soldiers in one another." *In re Grimley*, 137 U.S. 147, 153 (1890). This Court accordingly recognized in *Feres* and later cases that Congress did not intend the courts to pass on the propriety of military decisions or to place members of the service in the position of having to testify in an adversarial setting as to each other's actions. The prospect of judicial scrutiny, and of potential governmental tort liability, might exert improper pressures on officers and result in hesitation where decisive judgment is required. *Stencel Aero* recognized that allowing third parties a right of recovery would entail identical consequences. It would place the United States and members of its armed forces in an adversarial relationship in which recovery would turn on "the degree of fault, if any, on the part of the Government's agents and the effect upon the serviceman's safety. The trial [of a third-party claim] would * * * involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions" in a manner inimical to military discipline and order. 431 U.S. at 673. The same concerns would be present if private shipowners were permitted to seek contribution against the United States for damages paid to servicemen injured in a maritime collision. [4]

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[4] It is true that in cases such as this there will almost necessarily be claims of mutual property damage and that the owner of a private vessel may seek to call servicemen as witnesses to establish the negligence of the United States even if contribution claims for per-

c. The third factor mentioned in *Stencel Aero* was the irrationality of permitting the liability of the United States for the injury of an active serviceman to turn entirely on the "fortuity of the situs" of the accident. 431 U.S. at 672. It was unlikely that Congress, in enacting the FTCA, intended the government's vast military undertaking with its distinctively federal character to be regulated by "the law of the place where [a negligent] act or omission occurred." 28 U.S.C. 1346(b); *Feres* v. *United States*, *supra*, 340 U.S. at 142-143. It is equally improbable that Congress, in enacting the Public Vessels Act, intended to incorporate in that statute the anomalies that flow from the court of appeals' decision in this case. Had the injury to the individual claimants in this case resulted from the mutual fault of the United States and the respondent during an unloading operation on a pier, for example, respondent's claim for contribution would be barred. Not only does the availability of contribution in the Fourth Circuit now depend on whether the injury takes place at sea, on land, or in the air, but the law applicable even to maritime collisions may vary with the waters where they occur. The right to and extent of contribution

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sonal injuries are precluded. But the case is no different from collisions on land or in the air between private and military vehicles or airplanes, and there is no doubt that in those cases *Stencel Aero* would preclude indemnity or contribution claims by the private party even though claims for property damages might be allowed. Cf. *Stencel Aero Engineering Corp.* v. *United States*, *supra*, 431 U.S. at 676-677 (Marshall, J., dissenting). Perhaps more important, the testimony of military personnel in that context would not put them in an adversarial role against their command, since the serviceman has no personal interest in assuring recovery by the private party. On the other hand, when the serviceman sues a private shipowner and the United States is a third-party defendant, the United States is encouraged to "assert against the [serviceman] any defenses which the [private shipowner] has to the [serviceman's] claim." Fed. R. Civ. P. 14(a). And to insure against the private vessel owner's being unable to satisfy the serviceman's claim, the serviceman could find it in his interest to establish a larger share of proportionate fault on the part of the United States in order to maximize his recovery.

thus are subjected to the vagaries of foreign, rather than state, law. See generally *Lady Nelson, Ltd.* v. *Creole Petroleum Corp.*, 286 F.2d 684, 686 (2d Cir. 1961); *The Mandu*, 114 F.2d 361, 362 (2d Cir.), cert. denied, 311 U.S. 715 (1940); *States Marine Lines, Inc.* v. *The M/V Kokei Maru*, 180 F. Supp. 255, 256 (N.D. Cal. 1960); G. Gilmore & C. Black, *The Law of Admiralty* 489 (2d ed. 1975).

2.a. The court of appeals felt free to disregard these weighty considerations precluding contribution for injuries to servicemen because, it said, "[n]othing in *Feres*, *Stencel Aero*, or the cases that follow convinces us that the Supreme Court intended to alter the *Weyerhaeuser* rule. Until that Court expresses its intention to modify the rule in *Weyerhaeuser*, we are bound to follow it" (App. A, *infra*, 3a-4a). *Weyerhaeuser Steamship Co.* v. *United States*, *supra*, involved a collision between an Army dredge and a private vessel, in which a Civil Service employee aboard the Army dredge was injured. The owner of the private vessel brought an action against the United States under the Public Vessels Act and claimed, as part of its damages, a portion of the amount it had paid to the Army's civilian crew member. This Court began its opinion by pointing out that "the Public Vessels Act 'was intended to impose on the United States the same liability * * * as is imposed by the admiralty law on the private shipowner * * *.' " 372 U.S. at 600, quoting *Canadian Aviator, Ltd.* v. *United States*, 324 U.S. 215, 228 (1945). It then rejected the government's contention that the admiralty rule of divided damages was displaced by the exclusive liability provision in the Federal Employees' Compensation Act (FECA) (now codified at 5 U.S.C. 8116). The FECA, like the Veterans' Benefits Act, affords a statutory compensation scheme for federal employees and explicitly states that the government's liability under the Act "is exclusive * * * of all other liability * * * to the employee * * * and any other person otherwise entitled to recover damages from the United States * * * because of the

injury or death [of the employee]."[5] The Court nevertheless concluded that the divided damages rule "which, for more than 100 years, has governed * * * the correlative rights and duties of two shipowners whose vessels have been involved in a collision in which both were at fault[,] * * * must prevail over a statutory provision which * * * limited the liability of one of the shipowners * * *." 372 U.S. at 603.[6]

b. The apparent inconsistency between *Feres* and *Stencel Aero* on the one hand, and *Weyerhaeuser* on the other, is a conflict that only this Court can finally resolve. The government believes that such a decision must ultimately sustain the applicability of *Stencel Aero* to a case such as this. The court of appeals' decision took no account, for example, of the intrusion on military discipline and the anomalous treatment of sailors caused by a contrary result. Moreover, this Court has recently granted certiorari in *Lockheed Aircraft Corp.* v. *United States*, No. 81-1181 (Apr. 5, 1982), to consider the scope of the rule laid down in *Weyerhaeuser* and the force of the FECA's

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[5] The language in the current version, 5 U.S.C. 8116(c), quoted above, differs slightly from that in effect when *Weyerhaeuser* was decided. See 372 U.S. at 599.

[6] To the extent that the rule in *Weyerhaeuser* depended on the century-old pedigree of the divided damage rule, it is open to question after the decision in *United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975). In *Reliable Transfer* this Court abandoned the rule of equally divided damages long applied in cases—like *Weyerhaeuser*—arising from mutual fault collisions and replaced it with a rule of proportionate division according to fault. In the course of its decision this Court stressed the role of the judiciary to take "the lead in formulating flexible and fair remedies in the law maritime * * *." 421 U.S. at 409. It also emphasized that " 'the concept of "settled expectation" would be reduced to an absurdity were it to be applied to a rule of damages for negligent collision.' " *Id.* at 410, quoting G. Gilmore & C. Black, *supra*, at 531. Those comments apply with equal force to an interpretation of the divided damages rule that would ignore the force of the considerations underlying this Court's decisions in *Feres* and *Stencel Aero*.

limitation-of-liability provision as applied to non-maritime indemnity claims. Under these circumstances it is especially appropriate for this Court to provide direction to the lower federal courts about which of two conflicting yet apparently controlling precedents they should follow. See *Stencel Aero Engineering Corp.* v. *United States*, *supra*, 431 U.S. at 670 ("In this case we must resolve the tension between *Feres* and [*United States* v.] *Yellow Cab" Co.*, 340 U.S. 543 (1951)); *United States* v. *Brown*, *supra*, 348 U.S. at 111 ("The case is here on a petition for certiorari which we granted * * * because of doubts as to whether *Brooks* v. *United States*, 337 U.S. 49, or *Feres* v. *United States*, 340 U.S. 135, controlled this case").

3. It is particularly important for this Court to resolve the uncertainty that now exists in this area of the law, because maritime collisions involving the military—though not commonplace—occur with unfortunate frequency, and the great number of personnel threatened with injury or death in such incidents increases the government's exposure to monetary liability far beyond the limits fixed by the Veterans' Benefits Act. For example, actions arising out of the collision between the USCGC CUYAHOGA and an Argentine flag vessel, in which 12 Coast Guardsmen were killed, are currently pending in the United States District Courts for the Districts of Maryland and Massachusetts. *Empresa Lineas Maritimas Argentinas, S.A.* v. *United States*, Civ. No. T-78-2106 (D. Md.); *Martha S. Makin, et al.* v. *Empresa Lineas Maritimas Argentinas, S.A.*, 78-2810-N, *et al.* (D. Mass.). Should the servicemen's representatives prevail against the private shipowner, the United States may be open to indirect liability in the Maryland action under the Fourth Circuit's decision in this case. The United States has also entered into a stipulation in *In re Kingston Shipping Co. and Apex Marine Corp.*, Civ. No. 80-134-T-GC (M.D. Fla.), to pay 60% of the damages assessed against the private shipowner for the wrongful deaths of 23 Coast Guardsmen, contingent upon the ultimate resolution of this case. We are informed that the government's potential liability in these two actions alone could approximate $9 million. Another pending incident is the July 22, 1980, collision of

the aircraft carrier USS MIDWAY and a foreign flag ship in the Phillipine Sea, in which four of the MIDWAY's crew were killed or injured. Still other incidents involving only property damage illustrate the regularity with which such collisions take place.[7] It is often only a matter of good fortune that such accidents do not result in serious injuries or loss of life.

The court of appeals' conclusion is particularly unfortunate because the United States' largest naval base—at Norfolk, Virginia—is located within the jurisdiction of the Fourth Circuit, as is another large naval installation at Charleston, South Carolina. Moreover, under the venue rules applicable to Public Vessels Act cases, many collisions that occur outside the waters covered by the Fourth Circuit may nonetheless be litigated in that circuit. Section 4 of the Act, 46 U.S.C. 784, provides:

> Such suit[s] shall be brought in the district court of the United States for the district in which the vessel or cargo charged with creating the liability is found within the United States, or if such vessel or cargo be outside the territorial waters of the United States, then in the district court of the United States for the district in which the parties so suing, or any of them, reside or have an office for the transaction of business in the United States; or in case none of such parties reside or have an office for the transaction of business in the United States, and such vessel or cargo be outside the territorial waters of the United States, then in any district court of the United States. * * *

In other words, when a collision takes place outside the territorial waters of the United States, the private vessel owner may

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[7] One example is the collision on March 22, 1982, off Cape Henry, Virginia, between a Turkish vessel and the nuclear submarine USS JACKSONVILLE. Another, more highly publicized, incident was the collision between the USS GEORGE WASHINGTON and the M/V NISSHO MARU in the Japan Sea in April 1981. An action arising out of the latter incident has recently been filed in the United States District Court for the Southern District of New York. *China National Technical Import Corp., et al.* v. *United States*, 82 Civ. 2205 (S.D.N.Y.)

generally sue in the Fourth Circuit if it has an office there or (in the case of a foreign owner) if it has no office in this country. See also Fed. R. Civ. P., Supplemental Rules for Certain Admiralty and Maritime Claims, Rule F(9) (venue in limitation-of-liability actions). Given the legal uncertainty occasioned by the influence of *Weyerhaeuser* on this area of the law, those who collide with government ships will undoubtedly prefer to take advantage whenever possible of the generous contribution doctrine espoused by the court of appeals in this case, with the consequent impairment of military discipline and decisionmaking.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1982

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1466

In the Matter of the Complaint of
IONIAN GLOW MARINE, INC., as
Owner of the M/V STAR LIGHT for
exoneration from or limitation of liability,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee,

and

DONALD MILLER,

Defendant.

Appeal From The United States District Court For The Eastern District of Virginia, at Norfolk
J. Calvitt Clarke, Jr., District Judge

Argued: December 8, 1981
Decided: January 26, 1982

Before:

WIDENER, ERVIN, and CHAPMAN, Circuit Judges.

CHAPMAN, Circuit Judge

On March 4, 1979, the USS FRANCIS MARION and the M/V STAR LIGHT, a Greek flag cargo vessel collided off Cape Henry, Virginia. Both vessels sustained damages. Two Navy officers and a crewman on board the FRANCIS MARION were injured.

Appellant, Ionian Glow Marine, Inc., owner of the M/V STAR LIGHT brought suit seeking apportionment of damages under the divided damage rule in mutual fault collision cases in admiralty. The parties agreed that 65 percent of the government's provable damages would be paid by Ionian Glow and 35 percent of Ionian Glow's provable damages would be paid by the government. The issue of what damages were provable was left for the district court's determination.

As part of its provable damages, appellant claims $700,000 it paid in settlement of claims brought by the three injured servicemen. The servicemen's exclusive remedy against the government is a compensation claim under Veterans Benefits Act, 38 U.S.C. § 321 *et seq.* The government argues that to require it to pay 35 percent of Ionian Glow's settlement with the servicemen would subject it to indirect liability on a claim that could not directly be brought against the government. The district court agreed, holding that such a recovery would run afoul of the rule in *Feres* v. *U.S.*, 340 U.S. 135 (1950) and *Stencel Aero Engineering Corp.* v. *U.S.*, 431 U.S. 666 (1977). The only issue on appeal is whether the payments made to the three servicemen are proper items of appellant's damages. We hold that they are.

The Supreme Court in *Feres* held that servicemen could not bring an action against the government under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*, for injuries sustained while on duty. This rule was extended to indemnity suits brought against the government by third parties who had paid servicemen's claims in *Stencel Aero.* It is, therefore, beyond question that if this present suit were in the form of an indemnity suit under the FTCA it would be barred. We are faced instead with a mutual fault collision case in admiralty under the long established rule of divided damages. The crucial question is how that traditional rule is affected by the *Feres-Stencel Aero* doctrine. We think that it is not.

The question of whether immunity of one shipowner from suits by a third party prevents the other shipowner in a mutual fault collision from including as a proper item of damages payment of claims to that third party was first addressed by

the Supreme Court in *THE CHATTAHOOCHEE*, 173 U.S. 540 (1899). A provision of the *Harter Act*, 46 U.S.C. § 190-195 barred direct claims by cargo owners against the carrying vessel for negligent navigation. In *THE CHATTAHOOCHEE*, the cargo owner recovered against the non-carrying vessel owner. In allowing the non-carrying vessel to include the judgment in its provable damages, the Court held that even though immunity from liability was provided by statute the admiralty rule requires the carrying vessel to bear its proportionate share of the entire loss.

The rule announced in *THE CHATTAHOOCHEE* was reaffirmed by the Supreme Court in *Weyerhaeuser Steamship Co. v. U.S.*, 372 U.S. 597 (1963). A U.S. civil service employee was injured as a result of a mutual fault collision between a private vessel and an army dredge on which he was working. The private vessel owner settled a claim brought by the civil service employee for $16,000. A mutual fault collision suit was brought by the private shipowner under the Public Vessels Act, 46 U.S.C. § 781 *et seq.*, which requires the government to be treated as a private shipowner in admiralty suits. Though the government is immune from direct suit by the employee because of the exclusive remedy provisions of the Federal Employee Compensation Act, 5 U.S.C. § 777, the Court allowed the $16,000 to be included as a proper item of damages. After recognizing that the admiralty rule of divided damages had, for more than 100 years, clearly governed the correlative rights and duties of shipowners in mutual fault collisions, the Court states:

> Long ago this Court held that the full scope of the divided damages rule must prevail over a statutory provision which, like the one involved in the present case, limited the liability of one of the shipowners with respect to an element of damages incurred by the other in a mutual fault collision. *The Chattahoochee*, 173 U.S. at 540.

372 U.S. at 603.

Nothing in *Feres*, *Stencel Aero*, or the cases that follow convinces us that the Supreme Court intended to alter the *Weyerhaeuser* rule. Until that Court expresses its intention to

modify the rule in *Weyerhaeuser*, we are bound to follow it. Hence, we hold that the *Feres-Stencel Aero* doctrine does not preclude the inclusion of the servicemen's claims as a proper item of appellant's damages.

JUDGMENT REVERSED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA NORFOLK DIVISION

Civil Action
No. 79-259-N

In the Matter of the Complaint of
IONIAN GLOW MARINE, INC., as
Owner of the M/V STAR LIGHT for
Limitation of or Exoneration from Liability.

OPINION AND ORDER

This matter is before the Court on Cross-Motions for Partial Summary Judgment. This case arises out of a collision between the USS FRANCIS MARION and the M/V STAR LIGHT, owned by Ionian Glow Marine, Inc. (Ionian Glow). The United States and Ionian Glow have settled the liability issue of the case agreeing that the United States is to pay 35% of Ionian Glow's provable damages and Ionian Glow is to pay 65% of the United States' provable damages. The sole issue before this Court is whether Ionian Glow may include in its provable damages any amounts paid by Ionian Glow to the two officers and one enlisted member of the crew of the USS FRANCIS MARION [1] who were injured as a result of the collision while performing their regular duties aboard the ship.

Ionian Glow asserts that the Public Vessels Act, 46 U.S.C. § 781-789, provides that public vessels, such as the USS

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[1] The three injured claimants are: Commander Leary, who is still on active duty and is not expected to receive any disability payments; ENC Colley, who has retired with no disability; Commander Miller, who is still on active duty serving on a limited status pending a determination by a medical discharge evaluation board. The crew members would be compensated, if at all, under the Veterans Benefits Act, 38 U.S.C. § 321 *et seq.*

FRANCIS MARION, have the same liability as is imposed by admiralty law on private shipowners. Ionian Glow asserts that, since courts have allowed shipowners to include in their provable collision damages payments made to third parties, Ionian Glow is entitled to include in its provable damages payments made to these injured uniformed servicemen.

The Government contends that uniformed active duty personnel are prohibited from recovering from the United States directly or indirectly based on a tort claim where the alleged tort occurs during the ordinary course of their duties. The Government states that by allowing Ionian Glow to include in its provable damages any payments made to the injured servicemen, the Government will be held liable indirectly for such injuries by its having to pay 35% of those damages.

Discussion

The United States, as a sovereign nation, is immune from any suit to which it has not consented. *See Feres* v. *United States*, 340 U.S. 135, 139-40 (1950). Thus, the United States is not liable for torts committed by it except where it can be shown that the right to sue comes within some special statute permitting the suit such as the Public Vessels Act, 46 U.S.C. § 781-789, or the Federal Tort Claims Act, 28 U.S.C. § 1346, 2671-2680. In the present case, Ionian Glow has brought suit against the United States pursuant to the Public Vessels Act. The Public Vessels Act " 'was intended to impose on the United States the same liability (apart from seizure or arrest under a libel *in rem*) as is imposed by the admiralty law on the private shipowner. . . .' " *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597, 600 (1962), citing *Canadian Aviator, Ltd.* v. *United States*, 324 U.S. 215, 228 (1944). The Federal Tort Claims Act contains similar language, stating, "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . ." with certain exceptions not relevant here. 28 U.S.C. § 2674. Although these statutes purport to waive generally the sovereign immunity of the United States, special limitations

have developed when the claim against the United States is brought by a member of its armed forces.

In *Feres* v. *United States*, 340 U.S. 135 (1950), the United States Supreme Court created an exception to the Government's general waiver of sovereign immunity in the Tort Claims Act. In *Feres*, the Court held that the Government is not liable for injuries to servicemen "where the injuries arise out of or are in the course of activity incident to service." *Id.* at 146. The Court advanced three reasons for limiting the Government's waiver of sovereign immunity. First, the Court noted that the Act intends that the United States incur liability parallel to that of a private citizen under the same circumstances. The Court noted that no American law has ever permitted a serviceman to recover for negligence against his superior officers or the Government, "nor is there any liability 'under like circumstances,' for no private individual has power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons of command." *Id.* at 140-41. The Court concluded that Congress in passing the Act could not have intended to impose liability for negligence where there was no liability before. Second, the Court noted that the Act makes ". . . the law of the place where the act or omission occurred" govern any resulting liability. 28 U.S.C. § 1346(b). The Court stated that the relationship between the Government and members of its armed forces is "distinctively federal in character" and that it "makes no sense" to allow claims to be governed by local tort law. *Id.* at 143. Third, the Court noted that Congress has enacted generous death benefits and disability benefits for servicemen and their families. In *United States* v. *Brown*, 348 U.S. 110 (1954), the Supreme Court discerned a policy rationale for the *Feres* decision: "[t]he peculiar and special relationship of the soldier to his superiors, the effects of maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty." *Id.* at 112.

The rationale underlying the *Feres* doctrine limiting the Government's waiver of sovereign immunity under the Federal Tort Claims Act applies to suits brought by uniformed service personnel against the United States pursuant to the Government's waiver of sovereign immunity in the Public Vessels Act. *Beaucoudray* v. *United States*, 490 F.2d 86 (5th Cir. 1974); *Charland* v. *United States*, 615 F.2d 509 (9th Cir. 1980). Accordingly, the United States cannot be held directly liable for injuries incurred by its active service members while engaged in their duties whether the action is brought pursuant to the Federal Tort Claims Act or the Public Vessels Act.

In *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977), the Supreme Court considered whether a third party could bring suit against the Government under the Federal Tort Claims Act seeking indemnity for any damages it may be required to pay to a serviceman where the serviceman's direct action against the Government is barred by *Feres*. In *Stencel*, Donham, a captain in the Air National Guard, was injured permanently when the egress life-support system of his fighter aircraft malfunctioned during an emergency. Stencel Aero Engineering Corporation manufactured the ejection system according to Government specifications and used certain component parts provided by the United States.[2] Donham received a lifetime pension pursuant to the Veterans Benefits Act, 38 U.S.C. § 321 *et seq.*, and filed suit claiming damages against the United States and Stencel alleging that the system malfunctioned as a result of the negligence of the defendants.[3] *Id.* at 668. Stencel crossclaimed against the United States claiming that any malfunction was due to faulty specifications, requirements and components provided by the

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[2] There was no contractual relationship between the United States and Stencel. (Stencel had contracted with a prime Government contractor to provide the pilot eject system.) *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. at 667-68 n.2.

[3] Donham's claim against the United States was dismissed as barred by *Feres* v. *United States*, 340 U.S. 135 (1950).

United States and sought indemnity for any sums it may be required to pay Donham.

The Supreme Court held that the right of a third party to recover in an indemnity action against the United States is limited by the rationale of *Feres* where the injured party is a serviceman. The Court examined and applied the principles underlying the *Feres* decision to the facts in the *Stencel* case and concluded that "the third-party indemnity action in this case is unavailable for essentially the same reasons that the direct action by Donham is barred by *Feres*." *Id.* at 673.

Specifically the Court stated that the relationship between the Government and its "suppliers of ordnance" is "distinctively federal in character." *Id.* at 672. The Court noted that the Government performs a "unique, nationwide function in protecting the security of the United States. To that end military authorities frequently move large numbers of men, and large quantities of equipment, from one end of the continent to the other, and beyond. Significant risk of accidents and injuries attend such a vast undertaking." *Id.* at 672. The Court stated further that, "[i]f, as the Court held in *Feres*, it makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to a serviceman who sustains service-connected injuries, 340 U.S. at 143, it makes equally little sense to permit that situs to affect the Government's liability to a Government contractor for the identical injury." [4] *Id.* at 672.

Second, the Court considered the existence of the military compensation scheme. Stencel argued that "although it may be fair to prohibit direct recovery by servicemen under the Act, since they are assured of compensation regardless of fault under the Veterans' Benefits Act, [Stencel] as a third-party claimant should not be barred from indemnity for damages which it may be required to pay to the serviceman, and as to

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[4] Stencel's indemnity claim was based upon the laws of Missouri. *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. at 668 n.3.

which it has no alternative federal remedy." *Id.* at 672. In response, the Court stated that the Veterans' Benefits Act serves two purposes: it provides quick and efficient compensation for injured servicemen and establishes an upper limit of liability that the Government may incur for service-connected injuries. The Court stated that to allow Stencel's claim for indemnity would circumvent this limitation and thereby frustrate one of the essential purposes of the Veterans' Benefits Act.

Third, the Court stated that it was "quite clear that where the case concerns an injury sustained by a soldier while on duty, the effect of the action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party." *Id.* at 673.

Ionian Glow urges the Court to apply the reasoning in *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597 (1963). *Weyerhaeuser* involved a collision between an Army dredge and a private vessel. The private vessel brought suit to recover damages against the United States under the Public Vessels Act, and the United States filed a cross-libel. The district court found that the collision had occurred through the mutual fault of both vessels and held that each party was entitled to claim one-half of its provable damages and court costs. [5]

A United States civil service employee on board the dredge sustained personal injuries as a result of the collision. He received compensation from the Government under the Federal Employees' Compensation Act, 5 U.S.C. § 751 *et seq.*, and filed suit against the owner of the Weyerhaeuser to recover damages. This suit was subsequently settled for $16,000 and, as required by the Compensation Act, the employee repaid to the United States the amount he had received as statutory compensation. 5 U.S.C. § 777. The United States objected to

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[5] The Supreme Court has discarded this historical rule of equal damages for wrongdoers in collisions at sea and replaced it with a rule that, to the extent it is possible to allocate fairly degrees of fault, the parties should bear the damages in proportion to their degree of fault. *United States* v. *Reliable Transfer*, 421 U.S. 397 (1975).

the vessel's including this $16,000 as part of its provable collision damages. The Government argued that the exclusive liability provision of § 7(b) of the Federal Employees' Compensation Act altered the established admiralty rule and precluded any liability of the United States based on payments made to the civil service employee.

The Supreme Court granted certiorari to consider the single issue of whether the historic admiralty rule of divided damages in mutual fault collisions was qualified by the exclusive liability provision of the federal compensation statute. The Court examined the legislative history of the Federal Employees' Compensation Act and found that the Act, originally passed in 1916 was established "to provide federal employees a swift, economical, and assured right of compensation for injuries arising out of the employment relationship, regardless of the negligence of the employee or his fellow servants, or the lack of fault on the part of the United States." *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. at 601. The purpose of § 7(b), added in 1949 was "to establish that, as between the Government on the one hand and its employees and their representatives or dependents on the other, the statutory remedy was to be exclusive." *Id.* The Court stated further that "[t]here is no evidence whatever that Congress was concerned with the rights of unrelated third parties, much less of any purpose to disturb settled doctrines of admiralty law affecting the mutual rights and liabilities of private shipowners in collision cases." *Id.* Accordingly, the Supreme Court held that "the divided damages rule in mutual fault collisions is unaffected by a statute enacted to limit the liability of one of the shipowners to unrelated third parties." *Id.* at 604.

The Court finds that *Weyerhaeuser* does not apply to the facts in this case. *Weyerhaeuser* involved a United States civil service employee not an active duty serviceman injured while performing his regular duties aboard the ship. Accordingly, the Court in *Weyerhaeuser* did not give any consideration to the rationale of the *Feres* doctrine but considered only the narrow issue of whether § 7(b) of the Federal Employees Com-

pensation Act altered the admiralty rule of damages. In the present case, the injured parties are active duty servicemen who were injured while performing their regular duties aboard the ship. Accordingly, the *Feres* doctrine bars these individuals from suing the United States directly, *see Feres* v. *United States*, 340 U.S. 135 (1950); *Beaucoudray* v. *United States*, 490 F.2d 86 (5th Cir. 1974); *Charland* v. *United States*, 615 F.2d 509 (9th Cir. 1980); and the right of any third party for indemnity from the United States for payments made to these individuals is limited by the rationale of *Feres*. *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977).

In *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, the Supreme Court applied the *Feres* rationale to the claim of a third party for indemnity against the United States and found that the third-party claim was unavailable for essentially the same reasons that the direct action by the serviceman was barred. In *Stencel* the Court noted that the relationship between the United States and the party seeking indemnity was based on a commercial contract (although Stencel did not have a contract directly with the United States), and that the relationship between the Government and its "suppliers of ordance" is "distinctively federal in character." In the present case, there is no contractual relationship between the Ionian Glow and the United States. Nevertheless, the Court feels that the rationale of *Feres* applies with equal force to bar the claim of Ionian Glow.

In the present case, the servicemen will recover, if at all, under the Veterans' Benefits Act. One of the essential purposes of the Act is to provide an upper limit of disability that the Government may incur for service-connected injuries. *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. at 673. To allow Ionian Glow to include any payments made to these servicemen in its probable collision damages of which the Government has agreed to pay 35% would circumvent this limitation thereby frustrating one of the essential purposes of the Act. In addition, to allow these payments as part of Ionian Glow's provable damages would be to permit the situs of the alleged negligence to affect the Government's liability for the

service-related injury. The Supreme Court has stated that if it is inappropriate to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to a serviceman who sustains service-related injuries, it is equally inappropriate to permit that situs to affect the Government's liability to a third party seeking indemnity. Thus, it would be inconsistent with the *Feres* rationale to hold the Government liable for 35% of these service-related injuries merely because the crew members were injured at sea and not on land.

Although the judicial gloss placed on *Feres* in *Brown* v. *United States*, 348 U.S. 110 (1954), supplies a policy rationale suggesting that the bar to suits for service-related injuries rests on a policy of avoiding litigation that would have a disruptive impact on military discipline and morale, this doctrine has not been read so narrowly. *See Veillette* v. *United States*, 615 F.2d 505, 507 (9th Cir. 1980). Thus, the fact that the Government has admitted liability for negligence in the present case is not dispositive.

For the reasons stated above, the Court FINDS that the *Feres* doctrine bars the claim of Ionian Glow from including any payments made by it to the injured servicemen in its provable collision damages. Accordingly, the Motion of the Government for Partial Summary Judgment is GRANTED, and the Motion of Ionian Glow for Partial Summary Judgment is DENIED.

/s/ J. CALVITT CLARKE, JR.

United States District Judge

March 25, 1981
Norfolk, Virginia

APPENDIX C

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 81-1466

In the Matter of the Complaint of
IONIAN GLOW MARINE, INC., as
Owner of the M/V STAR LIGHT for
exoneration from or limitation of liability,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee,

and

DONALD MILLER,

Defendant.

AMERICAN INSTITUTE OF MERCHANT SHIPPING, COUNCIL OF AMERICAN FLAG SHIP OPERATORS, FEDERATION OF AMERICAN CONTROLLED SHIPPING, THE LONDON STEAM-SHIP OWNERS' MUTUAL INSURANCE ASSOCIATION LIMITED, THE NORTH OF ENGLAND PROTECTING AND INDEMNITY ASSOCIATION LIMITED, THE OCEANUS MUTUAL UNDERWRITING ASSOCIATION (BERMUDA) LTD, THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG),

Amici Curiae.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District

Court appealed from, in this cause, be, and the same is hereby, reversed.

/s/ WILLIAM K. SLATE III
CLERK

FILED
January 26, 1982
U.S. Court of Appeals
Fourth Circuit

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO: 81-2355

UNITED STATES OF AMERICA

Petitioner,

v.

IONIAN GLOW MARINE, INC.

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

In a mutual fault collision between a Navy vessel and a private cargo vessel, where the Government files an affirmative claim against the private vessel owner for its entire apportionable damages and stipulates to its own negligence, is the private shipowner also entitled to apportionment of its entire damages suffered in the collision.

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IN THE

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OCTOBER TERM, 1981

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Petitioner,

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IONIAN GLOW MARINE, INC.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

STATUTE INVOLVED

Section 3 of the Public Vessels Act, 46 U.S.C. §783, provides:

> In the event of the United States filing a libel in rem or in personam in admiralty for damages caused by a privately owned vessel, the owner of such vessel, or his successors in interest, may file a cross libel in personam or claim a set-off or counterclaim against the United States in such suit for and on account of any damages arising out of the same subject matter or cause of action: Provided, That whenever a cross libel is filed for any cause of action for which the original libel is filed by authority of this Act [46 USCS §781 *et seq.*], the respondent in the

cross libel shall give security in the usual amount and form to respond to the claim set forth in said cross libel unless the court, for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security shall be given.

STATEMENT

On March 4, 1979, while manned by reservists returning from the Mardi Gras festival in New Orleans, the USS FRANCIS MARION collided with the private cargo vessel STAR LIGHT. Both vessels sustained damages. Damages to the USS FRANCIS MARION included injury to three of her servicemen.

In the subsequent limitation of liability proceeding, the Government and the three injured servicemen filed claims for their damages arising out of the collision. (C. App. 18, 21, 27, 28). Ionian Glow Marine, Inc., as owner of the STAR LIGHT, asserted a counterclaim against the Government under the Public Vessels Act, 46 USC §781 *et seq.* (C. App. 23). The 46 U.S.C. §783 counterclaim sought Ionian Glow's own damages arising out of the same collision — including, but not limited to, any payments which the shipowner might ultimately make to the service claimants for their personal injury damages.

Following extensive pleadings, discovery and pre-trial preparation, Ionian Glow and the Government negotiated settlement of the liability aspect of the litigation.[1] Reflecting the substantial fault of both vessels, the settlement provided that the Government would pay 35% of Ionian Glow's provable damages, and that the shipowner would pay 65% of the Government's provable damages. (C. App. 30). As the Government concedes in its Petition for Certiorari, the settlement was made in accordance with the admiralty rule of apportioning damages arising out of proportionate fault collisions.

Upon entry of an interlocutory order apportioning fault, the shipowner proceeded with the defense of the service-

[1] At the Initial Pre-Trial Conference, the Eastern District of Virginia bifurcated the issues of liability and damages.

men's claims. The shipowner kept the Government fully apprised regarding the particulars of each claimant's injuries, damages, and settlement demands. The Government filed a petition in connection with each of these claims, asserting its liens for medical services provided these servicemen, under 42 U.S.C. §2651. The claims of the three crewmen aboard the USS FRANCIS MARION were ultimately settled by the shipowner for a total sum of approximately $700,000, out of which the Government was fully reimbursed for its lien for medical services. The Government and the shipowner reached an agreement as to the extent of the other damages, physical and consequential, suffered by the vessels, with the Government obtaining a net recovery well exceeding the personal injury damages.

The settlement agreement reserved for judicial determination the propriety *vel non* of including damage payments to the three naval crew members as part of Ionian Glow's apportionable damages. (C. App. 30). Agreeing on the absence of any genuine issue of material fact, the parties presented to the District Court, on cross motions for partial summary judgment, the question whether Ionian Glow's apportionable damages included personal injury payments to the three servicemen.

Relying on pleadings and supporting briefs, but without the benefit of oral argument, the District Court granted the Government's Motion for Partial Summary Judgment. (C. App. 61). Invoking *Feres v. United States*, 340 U.S. 135 (1950) and *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977), the lower court based its decision on characterization of the apportionment of damages between the Government and Ionian Glow as relating to third-party indemnity rather than traditional maritime allocation of collision damages.

Reversing, the United States Court of Appeals for the Fourth Circuit recognized that Ionian Glow's counterclaim seeking collision damages involved not an indemnity suit under the *Feres-Stencel Aero* doctrine, but rather traditional maritime apportionment of damages. The Fourth Circuit therefore noted that the case was governed by *The CHATTAHOOCHEE*, 173 U.S. 540 (1899), as reaffirmed by *Weyerhaeuser Steamship Co. v. U.S.*, 372 U.S. 597 (1963).

REASONS FOR DENYING THE PETITION

Rather than advancing any special or important reasons for granting the instant petition for certiorari, the Government largely confines itself to repeating precisely the same arguments on the merits previously addressed to the Fourth Circuit Court of Appeals. The Court of Appeals' decision not only is consistent with the precedent of both this Honorable Court and the lower courts, but also is supported by independent grounds not even reached by the Circuit Court.

I. THE COURT OF APPEALS' DECISION CREATES NO DOCTRINAL OR POLICY INCONSISTENCIES REQUIRING RESOLUTION BY THIS HONORABLE COURT.

The crux of the Government's petition lies in the alleged tension between the *Feres-Stencel* indemnity line of cases, on the one hand, and ancient admiralty jurisprudence apportioning the *entire* damages suffered by vessels involved in proportionate fault collisions, on the other. The fallacy in the Government's allegation of "tension" lies in its failure to distinguish between the two completely different doctrinal and policy concerns involved: (1) the concerns enunciated in *Feres-Stencel Aero,* relating to the need for uniform federal law, limitation on the Government's financial exposure, military morale and absence of unfairness from prohibiting indemnity by ordinance suppliers, in cases where a private contractor having a consensual relationship with the Government seeks indemnity, and (2) the ancient maritime concern with adducing care and vigilance, as well as fairness, to all parties involved in navigation, by apportioning *entire* damages stemming from a proportionate fault collision. The divergent focus of these distinct and separate concerns dispels any assertion that there exists a "tension" between the *Feres-Stencel Aero* line of indemnity cases, on the one hand, and *The CHATTAHOOCHEE* line of cases relating to admiralty's apportionment of damages in proportionate fault collision cases, on the other.

Hence, the Court of Appeals' decision is fully consistent with the decisions of this Honorable Court. The decision is equally consistent with case law from other circuits.

A. The Court of Appeals' Decision Comports With the Precedent of this Honorable Court Apportioning Entire Damages in Proportionate Fault Collisions.

Ship collisions, and the cause of actions arising therefrom, have long fallen exclusively within maritime jurisdiction. The principle of apportioning the *entire* damages suffered by vessels involved in mutual and/or proportionate fault collisions is the very heart of admiralty's comparative fault rule of allocating losses.[2]

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[2] The rule of apportioning damages in proportionate fault collisions extends at least back to this Honorable Court's seminal decision in *The Schooner CATHERINE v. Dickinson*, 58 U.S. 170 (1854). Distinguishing admiralty's apportionment of mutual fault collision losses from the common law principle of contributory negligence, the court recognized that the principle of apportioning damages was "the well-settled rule in English admiralty." *Id.* at 177. The court went on to postulate two policy considerations underlying the admiralty rule of apportioning damages in divided fault collisions: (1) the distributive justice achieved by making a party partially responsible for a collision liable for the entire loss; and (2) the prophylactic deterrent to future losses achieved by placing on a negligent party a portion of the entire damages caused by his fault. *Id.* at 177-78.

Following its decision in *The Schooner CATHARINE*, this Honorable Court has had occasion to amplify the admiralty principle of apportionment of damages resulting in proportionate fault collisions. For example, in *The ATLAS*, 93 U.S. 302 (1876), the Court recognized that the admiralty policy considerations underlying the rule of apportionment of damages required division of the vessel's *entire* damages. Tracing the rule in mutual fault collisions to Lord Stowell's analysis in *The Woodrop*, 2 Dodson 85, the court observed that where both parties were to blame "the loss must be apportioned between them, *as having been occasioned by both.*" *Id.* at 312 (emphasis added). In further exploring the rule for apportioning damages, the court stressed that the *entire damages* should be added together, as the basis of the apportionment.

> Under the second of the foregoing rules, — when both vessels are in fault, — *the sums representing damages are added together*, and the amount is equally divided between the parties: (and that rule prevails *in all cases where there is mutual fault* . . . Both vessels being in fault, the positive rule of the court of admiralty, says Lord Denman, requires the damage done to both ships be added together, and the combined amount to be equally divided between the owners of the two.)

Id. at 312-14. Thus, the Supreme Court earlier recognized that one of the inextricable incidents of the principle of apportioning damages in admiralty is that the *combined amount of the loss* must be apportioned between the offending vessels. *Id.* at 320.

Yet, the fact that the substantive maritime law may differ in many of its rules from the common law is, and has been, no reason to refuse to apply the proper maritime law to a particular case. In *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), in overturning its decision in *The HARRISBURG*, 119 U.S. 199 (1866) — which had held that the maritime law did not recognize an action for wrongful death — this Honorable Court recognized the distinct functional considerations underlying admiralty law as a field of jurisprudence. Concluding that *The HARRISBURG* had been wrong in relying on common law precedent, Justice Harlan stated for a unanimous Court:

> [I]t is not apparent why the Court in *The HARRISBURG* concluded that there should not be a different rule for admiralty from that applied at common law. Maritime law had always, in this country as in England, been a thing apart from the common law.

Similarly, in *The MAX MORRIS*, 137 U.S. 1 (1890), the Supreme Court again recognized that the rule of apportionment of damages requires "the damages suffered by the two vessels being added together." As *The MAX MORRIS* court observed, injuries to third parties were collectible and should be apportioned between both vessels:

> In the case of The WASHINGTON, two vessels were held in fault for a collision which resulted in injuries to an innocent passenger on one of them, who proceeded against both in the same libel. This court held that the damages to the passenger ought to be apportioned equally between the two vessels with the reservation of a right in the libellant to collect the entire amount from either of them in case of the inability of the other to respond for her portion.

Id. at 9. *See also The ALABAMA*, 92 U.S. 695, 697 (1875). Other cases have similarly indicated that admiralty's rule of apportioning damages in proportionate fault collision cases requires allocation of *all* damages stemming from the collision. *See Atlee v. Packet Company*, 88 U.S. 389 (1874); *The JUNIATA*, 93 U.S. 337 (1874).

Thus, in *The CHATTAHOOCHEE*, *supra*, the cargo interest successfully recovered its *full loss* from the non-carrying vessel on a mutual fault collision — where recovery of such loss from the carrying vessel was barred by the provisions of the Harter Act, 46 U.S.C. §190 *et seq.*, because the carrying vessel's sole negligence was one of navigation. The Supreme Court held that even though it was immune from liability to cargo by

398 U.S. at 386-87. This Honorable Court most recently reiterated the continued vitality of maritime law as a distinct corpus of jurisprudence — as well as the desirability of admiralty law's uniformity — in *Foremost Insurance Co. v. Richardson*, ____U.S. ____, 50 U.S.L.W. 4778 (June 23, 1982).

B. The Court of Appeals' Decision Comports With the Decisions of Other Circuits.

Similarly, the lower courts have had no difficulty in distinguishing the admiralty principles underlying *The CHATAHOOCHEE-Weyerhaeuser* line of cases apportioning damages in proportionate fault collisions from *Feres-Stencel Aero* indemnity. In *United Air Lines v. Wiener*, 335 F.2d 379 (9th Cir.) *cert. denied sub nom., United Air Lines v. United States*, 379 U.S. 951 (1964), the district court had relied on the exclusivity provision of the F.E.C.A., *supra*, and upon *Feres* to bar a suit by United Air Lines against the United States for indemnity in respect of wrongful death actions brought against the airline by both civilian and military government employees. The *Weiner* expressly distinguished *Weyerhaeuser:*

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statute, the carrying vessel nevertheless was obligated to bear its proportionate share of the loss under the divided damages rule.

Sixty years later, this Honorable Court again considered the propriety of a third-party claim as an element of total collision damages, where a statutory bar existed to the assertion of claims against one of two shipowners. In *Weyerhaeuser, supra*, the court again recognized the applicability of traditional maritime apportionment of collision damages to actions involving a public vessel. Specifically, the *Weyerhaeuser* court analyzed the Federal Employees' Compensation Act, 5 U.S.C §7902, *et seq.*, and found "no evidence . . . of any purpose to disturb settled doctrines of admiralty affecting the mutual rights and liabilities of private shipowners in collision cases." *Id.* at 601.

Overwhelming policy considerations underlie the principle that whenever the Government seeks affirmative relief, it waives its sovereign immunity. Failure to permit counterclaims or off-sets would prevent the very court, whose jurisdiction the Government had invoked, from according complete relief in the case. Moreover, absence of the waiver of sovereign immunity would work a gross injustice — on the one hand subjecting a private party to civil liability to the Government, while on the other hand depriving him of a chance to mitigate or off-set that liability by virtue of his own counterclaims.

> The Supreme Court in *Weyerhaeuser* . . . held that the express provisions of the statute do not qualify the historic admiralty rule of divided damages in mutual fault collisions. The admiralty rule of divided damages is to be distinguished from the rule of indemnity urged upon us by United since under admiralty law there arises from a collision involving mutual fault the *right to apportionment of all damages resulting therefrom*, including personal injuries, cargo damage, and damage to the ships. The divided damage rule is based upon the duty which each shipowner owes the other to navigate safely irrespective of any duty to the person injured.

Id. at 402-03 (footnotes omitted, emphasis added). *Accord, Nutt v. Loomis Hydraulic Testing Co., Inc.* 552 F.2d 1126, 1132 (5th Cir. 1977); *Newport Air Park, Inc. v. United States*, 419 F.2d 342, 345 (1st Cir. 1969).

Nor are these cases weakened, as the Government would have this Honorable Court infer, by the decision in *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975). As the Supreme Court has observed, *Reliable Transfer* effected no organic change in American maritime law, but merely a change in the method of apportionment of collision damages from equal division to on the basis of comparative fault. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 271 n. 30.

In fact, not a single decision of any federal court, district or circuit, disagrees in the slightest with the Court of Appeals' decision below in the context of maritime collision law. Therefore, the writ sought by the government is wholly unjustified.

In short, maritime law has long acknowledged as sacrosanct, the all inclusive nature of collision damages suffered by each vessel in a collision, even when such damages include the claims of third parties asserted and allowable solely against one of the shipowners. *The CHATTAHOOCHEE, supra*. The right of each party to recover its proportionate share of its *total* provable damages emanates from the duties and obligations flowing between the shipowners *per se*, and *not* from either of the shipowner's relationship to third parties, or from any limitation thereon — statutory or judicial.

II. EVEN IF THE COURT OF APPEALS' DECISION CREATED INCONSISTENCIES, IT IS SUPPORTED BY INDEPENDENT GROUNDS NOT EVEN REACHED BY THE COURT.

In support of a judgment in his favor, a respondent may rely upon lines of analysis which were not passed upon, or which were even rejected, by the court below. *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977); *Hankerson v. State of North Carolina*, 432 U.S. 233 (1977); *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970). Where, as in the instant case, the error complained of by the petitioner would not affect the substantial rights of the parties because the same result would be reached on another ground, this Honorable Court should deny the Writ of Certiorari. *See The MONROSA v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959).

Yet, at least two independent grounds — not even reached by the Court of Appeals — support the decision below. First, the counterclaim provisions of the Public Vessels Act waived the Government's immunity. Second, the Government inherently waived its immunity in seeking affirmative relief.

A. The Counterclaim Provisions of the Public Vessels Act Waived the Government's Immunity.

The rule which the United States would impose can only be denominated a sub-species of sovereign immunity. The nature of one of the parties (i.e., sovereign) and of the personal injury claimants (military personnel) leads the Government to conclude that the United States is "immune," not from suit but rather from one specific damage element.

Yet, the instant case involves merely a simple application of the Public Vessel Act's counterclaim provision, 46 U.S.C. §783. *Section 783 expressly authorizes counterclaims whenever the United States sues in admiralty for damages caused by a privately owned vessel.*

In the instant case, the Government affirmatively invoked the aid and assistance of the judicial branch of government by filing a claim — even though it was not required to do so. By virtue of the counterclaim provisions of the Public Vessels Act, the Government thereby waived its immunity

with respect to Ionian Glow's counterclaim for damages arising out of the same collision. *Therefore, even if the Fourth Circuit's decision were otherwise in conflict with decisions of this Honorable Court or of other circuits, the instant case would involve a simple application of 46 U.S.C. §783 — an application not meriting review.*

B. Independently of the Public Vessels Act, In Invoking the Affirmative Aid and Assistance of the Courts, the Government Inherently Waived Any Immunity It Might Otherwise Enjoy.

Crucially, the principle underlying the admiralty rule of apportionment of damages lies in the recognition that — by the very nature of admiralty's apportionment of damage in mutual fault collision cases — the Government inherently waives its sovereign immunity with respect to damages to be apportioned. The courts have long recognized that, even where the sovereign enjoys immunity, it waives its immunity by pressing its affirmative claims for relief. The waiver rule applies to both foreign sovereigns and the United States.[3]

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[3] In reliance upon the long established admiralty jurisprudence of this Honorable Court, the lower courts have consistently held that whenever the Government comes into court seeking relief in admiralty collision cases, it waives its claim to sovereign immunity. For example, in *United Philippines Lines, Inc. v. Submarine USS DANIEL BOONE*, 475 F.2d 478 (4th Cir. 1973), the government had claimed sovereign immunity, while at the same time filing a counterclaim based on the collision in which it had been involved. Affirming the district court's finding that the Government had waived its immunity in suing for affirmative relief in admiralty, the appellate court observed:

> When the United States comes into an admiralty court and asks "the court to complete the adjudication of a cause which was rightfully begun in that jurisdiction, we think the government is bound by the submission . . . " *United States v. The Steamer NUESTRA SENORA DE REGLA*, 108 U.S. 92, 103 (1883). By asking that justice be done with regard to a maritime collision, the United States becomes subject to the rule set forth in *Luckenback Steamship Co. v. The THEKLA*, 266 U.S. 328 (1924) . . . In seeking dismissal of the plaintiff's claim, an affirmative judgment on its counterclaim, and the arrest of the QUEZON in the instant case, the Government has so far taken the position of a private suitor as to waive its sovereign immunity. *This results from the peculiar "relationship characteristic of claims for collisions in admiralty but entirely absent in claims and cross-claims" in other civil cases.*

Id. at 479-480 (emphasis added).

This principle of waiver of sovereign immunity *derives from the unique nature of apportioning damages in admiralty collision cases.* In the *United States v. Shaw*, 309 U.S. 495 (1940), the Supreme Court recognized that the principle of *The THEKLA*, 266 U.S. 328 (1924), derived from the special nature of admiralty's apportionment of collision damages:

> *The THEKLA turns upon a relationship characteristic of claims for collisions in admiralty but entirely absent in claims and cross-claims in settlement of estates.* The subject matter of a suit for damages in collision is not the vessel libelled, but the collision. Libels and cross-libels for collisions are one litigation and give rise to one liability. In equal fault, the entire damage is divided. *As a consequence, when the United States libels the vessel of another for collision damages and a cross-libel is filed, it is necessary to determine the cross-libel as well as the original libel to reach a conclusion as to liability for the collision. That conclusion must be stated in terms of responsibility for damages.*

Id. at 502-03 (emphasis added).

In other words, by the very nature of apportionment of damages in maritime collisions, whenever the Government seeks to recover damages in proportionate or mutual fault collision cases, it inherently waives its immunity with respect to those damages. Otherwise, it would be impossible to apportion damages in accordance with the admiralty rule.[4] The *THEKLA*, *supra*, and its progeny rest on one primary underpinning: although a

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[4] The rule of *The THEKLA* has been repeatedly cited with approval, and no court has suggested that the Public Vessels Act vitiates the holding. *See e.g. United States v. Shaw*, 495 (1940); *Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, 134 (1928); *United Philippine Lines, Inc. v. Submarine USS DANIEL BOONE, supra; United States v. The AUSTRALIAN STAR*, 172 F.2d 472, 478 (2d Cir. 1949), *cert. denied*, 338 U.S. 823 (1949).

Thus, as Moore indicates, "the rule in admiralty . . . is clear that when a sovereign sues, an affirmative judgment may be rendered against the sovereign on a claim that grows out of the subject matter of the sovereign's suit." 3 *Moore's Federal Practice*, para. 13.27 (1981). *See also American Propeller & Mfg. Co. v. United States*, 300 U.S. 475, 478 (1937) (indicating continued viability of The THEKLA).

sovereign enjoys inherent immunity, whenever the sovereign, itself, affirmatively seeks relief from a court, it subjects itself to that court's jurisdiction — waiving its immunity — at least to the extent of the relief of which it seeks. This waiver would be equally applicable whether the Government sought immunity from its entire liability or simply from a sub species of its damages, as here.

III. ASSUMING THE COURT OF APPEALS' DECISION WERE OTHERWISE UNSUPPORTED BY EITHER PRECEDENT OR INDEPENDENT GROUNDS, PRUDENTIAL CONSIDERATIONS WOULD RENDER THE DECISION AN INAPPROPRIATE VEHICLE FOR REVIEWING THE *FERES-STENCEL AERO* DOCTRINE IN ADMIRALTY.

The instant proceeding, which construes a settlement contract based on a proportionate fault collision at sea, involves doctrinal and policy considerations totally different from the *Feres-Stencel Aero* line of cases. Unlike the *Feres-Stencel Aero* cases — where the Government was purely a defendant, and in no way benefited from the litigation, or otherwise took any affirmative action which might waive its immunity — the Government in the instant suit has not only affirmatively

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Conversely, adopting the premise which lies at the heart of the Government's case — that the *Feres-Stencel* line of cases somehow overruled 46 U.S.C. §783, as well as venerable American jurisprudence of the inherent waiver in seeking judicial assistance — would effect a radical transformation in the law of sovereign immunity. The sovereign's waiver of immunity upon seeking affirmative relief has been long recognized in the context of both domestic and foreign invocations of sovereign immunity. The principle has been codified by the Foreign Sovereign Immunities Act of 1976, *see* 28 U.S.C. §1607, as well as by U.S. statutes dating from 1797. *United States v. Shaw, supra*, 309 U.S. at 501. *See also* 28 U.S.C. §2406. In short, the principle that a sovereign who affirmatively seeks relief waives his sovereign immunity is endemic to traditional American notions of fair play and substantive justice. *See generally The DAVIS*, 77 U.S. (10 Wall.) 15, 21-11 (1869); *Guaranty Trust Company of New York v. United States*, 304 U.S. 126 (1928); *The SIREN*, 74 U.S. 152 (1868) (notwithstanding the sovereign immunity of the United States — whenever property itself, through affirmative action of the United States — becomes subject to the jurisdiction and control of the courts, a private suitor may enforce his claim for collision damages against that property.)

pressed claims against Ionian Glow, but also sought to have damages apportioned, and has ineluctably benefited from the apportionment of damages. Unlike the *Feres-Stencel Aero* line of cases — where the Government had at no time conceded its liability — the Government in the instant case has stipulated that it was 35% negligent, and that damages should be apportioned accordingly. Unlike the third-party indemnity involved in the *Feres-Stencel Aero* cases, the suit *sub judice* involves admiralty's proportionate fault *apportionment* of damages. Unlike the contractual relationships between the Government and the third-party plaintiffs in the *Feres-Stencel Aero* line of cases, the relationship between Ionian Glow and the Government in the instant case was not a consensual relationship, based on a commercial contract, but rather arose out of an involuntary collision at sea — a relationship which was obviously neither anticipated nor agreed to by either party. Unlike the *Feres-Stencel Aero* line of cases, the instant suit involves not novel theories of liability, but rather principles of allocating damages based on the ancient admiralty rule of proportioning damages in apportioned fault collisions — a rule at least one thousand years old. Unlike the *Feres-Stencel Aero* cases, the instant suit proceeds not under the Federal Tort Claims Act and indemnity principles, but rather stems from traditional principles of admiralty jurisprudence. In short, the facts *sub judice* are governed, not by the *Feres-Stencel Aero* indemnity jurisprudence, but rather by the unique admiralty principle of apportioning damages in proportionate fault collision cases.

The instant case does not involve a private ordinance supplier's suit against the government for indemnity or contribution. Rather, this case falls within the unique doctrines and policy considerations applicable to proportionate fault collision cases. As the Fifth Circuit has observed, the principle of apportionment of damages in proportionate fault collision cases represents a special principle of admiralty law:

> Questions of apportionment of damages in mutual fault collision cases occupy a unique and longstanding position in our law . . . Even with the comparative neg-

ligence rule, apportionment of damages in mutual fault collision cases still occupies a unique position in our law.

Nutt v. Loomis Hydraulic Testing Co., 552 F.2d 1126, 1132 (5th Cir. 1977).

Equally fallacious is the Government's suggestion that this Honorable Court's grant of certiorari in *Lockheed Aircraft Corp. v. United States*, No. 81-1181 (April 5, 1982) dictates a similar grant of certiorari in the instant case. As the Government admits in its own Brief in opposition in *Lockheed*, "even if correct, the decision [in *Ionian Glow Marine, Inc.*] has little bearing on this case [*Lockheed*], since the justification for departing from *Stencel* was *Weyerhaeuser's* unique divided damages rule, whose application, as noted above, is restricted to maritime collisions." As the Government, itself, recognizes the instant cases has nothing to do with the *Feres-Stencel Aero* line of cases — and does not merit review.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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No. 81-2355

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

IONIAN GLOW MARINE, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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REPLY MEMORANDUM FOR THE PETITIONER

This case presents the question whether *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977), or *Weyerhaeuser Steamship Co.* v. *United States*, 372 U.S. 597 (1963), controls a private shipowner's right to collect contribution from the United States for damages paid to servicemen injured in a maritime collision. Respondent has asserted (Br. in Opp. 9-12) that the apparent inconsistency between those two cases does not exist, because the government's liability is required (independently of *Weyerhaeuser*) by 46 U.S.C. 783 and by this Court's deci-

sion in *United States* v. *The Thekla*, 266 U.S. 328 (1924). These arguments are without merit. Respondent alternatively argues that *Weyerhaeuser* controls apportionment of damages in all maritime collision cases (Br. in Opp. 4-8, 12-14). This *ipse dixit* merely reenforces the tension that the government has asked this Court to resolve.

1. Respondent claims that *Stencel Aero* is inapplicable because it rests on principles of sovereign immunity, and Congress has waived the immunity of the United States by authorizing counterclaims against the government in Section 3 of the Public Vessels Act, 46 U.S.C. 783 (Br. in Opp. 9-10). Respondent also argues that the government "inherently waives" sovereign immunity, under the rule of *The Thekla*, *supra*, whenever it presses affirmative claims for relief in admiralty (Br. in Opp. 10-12). These contentions misapprehend the nature of sovereign immunity.

Sovereign immunity may be waived either generally or to a limited degree. See *United States* v. *Shaw*, 309 U.S. 495, 502-503 (1940). Congress' decision to waive sovereign immunity for purposes of subjecting the United States to suit under the Public Vessels Act [1] hardly entails a waiver of sovereign immunity to claims for contribution for damages paid to members of the armed forces. A comparison with the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, is instructive. In that Act Congress waived sovereign immunity to suits (including actions for indemnity) sounding in tort. But as this Court recognized in

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[1] The history and scope of that waiver of immunity are discussed in *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164 (1976), and *American Stevedores, Inc.* v. *Porello*, 330 U.S. 446, 450-454 (1947).

Feres v. *United States*, 340 U.S. 135 (1950), and *Stencel Aero*, that waiver alone did not determine the distinct question whether Congress had waived immunity to claims arising from injuries the government may have caused to members of the armed forces.[2] Those cases exemplify this Court's frequent admonition that waivers of sovereign immunity must come from Congress, and must be clearly and unequivocally expressed. See, *e.g.*, *United States* v. *Testan*, 424 U.S. 392, 399 (1976); *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941).

Similarly, *The Thekla* (decided before enactment of a comprehensive statutory scheme in the Public Vessels Act) held only that the United States, when it affirmatively invoked the court's jurisdiction by filing a libel, subjected itself to claims arising out of the same events. The decision did not address the items that might be included as damages in such a cross-libel. Indeed, in *United States* v. *Shaw*, *supra*, 309 U.S. at 503, this Court declared that the decision in *The Thekla* did not "indicate an intention to permit generally unlimited cross-claims."

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[2] Respondent's argument suggests that 46 U.S.C. 783 is a waiver of sovereign immunity that is somehow more generous than the one in Section 1 of the Public Vessels Act, 46 U.S.C. 781. In fact, the general waiver of immunity applicable to all claims under the Act is found in Section 1. That section creates a cause of action "for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided*, That the cause of action arose after the 6th day of April 1920." Section 3, by contrast, simply authorizes the procedural device of filing cross-libels, setoffs, and counterclaims in libels filed by the United States, and directs that the cross-libellant shall post security.

2. Although it argues that no unsettled question is raised because *Weyerhaeuser* simply controls apportionment of damages in all maritime collision cases (Br. in Opp. 4-8, 12-14), respondent implicitly underscores the apparent inconsistency between that case and *Stencel Aero Engineering Corp.* v. *United States, supra,* as applied to mutual fault collisions resulting in injuries to military personnel. Nowhere does respondent explain how following *Weyerhaeuser* can be squared with the limitation of liability that *Stencel Aero* (431 U.S. at 673) found in the Veterans' Benefits Act, 38 U.S.C. 301 *et seq.* Nor does respondent explain why permitting third parties to recover from the United States in this situation will not disrupt the "peculiar and special relationship of the [serviceman] to his superiors * * *." *United States* v. *Brown,* 348 U.S. 110, 112 (1954); *Feres* v. *United States, supra,* 340 U.S. at 141-143. Finally, respondent's reliance on *Weyerhaeuser* offers no reason why that "distinctively federal" relationship (*Stencel Aero Engineering Corp.* v. *United States, supra,* 431 U.S. at 671)—which precludes actions for contribution when servicemen are injured on land or in the air—should not be equally significant in the case of servicemen injured at sea.

Respondent assumes (Br. in Opp. 7-8) that because the divided damages rule prevailed in *Weyerhaeuser* over the exclusive liability provision in the Federal Employees' Compensation Act, 5 U.S.C. 8116(c) ("FECA"), it equally overcomes *Stencel Aero's* rule against contribution for damages paid to servicemen. But the decision in *Weyerhaeuser* rested on considerations inapposite here. The Court there found "no evidence whatever [in the legislative history of the FECA] that Congress was concerned with the rights of unrelated third parties, much less of any

purpose to disturb settled doctrines of admiralty law * * *." *Weyerhaeuser Steamship Co.* v. *United States, supra*, 372 U.S. at 601. The FECA was originally enacted in 1916, long after the rule of divided damages in mutual fault collisions had become a fixture of admiralty law. In this case, by contrast, that "settled doctrine of admiralty law" confronts a limitation on the government's liability that has equally ancient roots. "We know of no American law which ever has permitted a soldier to recover for negligence, against * * * the Government he is serving." *Feres* v. *United States, supra*, 340 U.S. at 141.[3] Moreover, whatever might be the rights of "unrelated third parties" under the FECA, *Stencel Aero* found in the Veterans' Benefits Act a clear intent to bar third-party claims for contribution or indemnity, and to cloak the United States in " 'the protective mantle of the Act's limitation-of-liability provisions' " (431 U.S. at 673).[4]

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[3] Not only is there no universal principle compelling the apportionment of damages paid to injured members of the armed forces, but Article 4 of the Brussels Collision Liability Convention of 1910 (*reprinted in* 6 *Benedict on Admiralty* 3-12 (7th ed. 1982)), on which this Court relied in part in *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 403-404 (1975), provides that:

> It is left to the law of each country to determine, as regards such recourse, the scope and effect of any legal or contractual provisions which limit the liability of the owners of a vessel toward persons on board.

[4] Respondent suggests (Br. in Opp. 8) that *Stencel Aero* is simply inapposite because that case involved the government's derivative tort liability to injured members of the armed forces, whereas admiralty's divided damages rule may be said to describe a duty running between two shipowners themselves to share all damages incurred as a result of mutual fault. See *Weyerhaeuser Steamship Co.* v. *United States*,

There is no formula that dictates that ordinary maritime rules must always prevail in maritime cases notwithstanding the identities of the parties involved. Rather, "it is the duty of this Court to attempt to fit the Public Vessels Act, as intelligently and fairly as possible, 'into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole.' " *Johansen* v. *United States*, 343 U.S. 427, 432 (1952), quoting *Feres* v. *United States*, *supra*, 340 U.S. at 139.

3. Although we believe that the court of appeals erred and that its decision has potentially significant effects, it would be prudent for this Court to withhold decision on the petition in this case pending disposition of *Lockheed Aircraft Corp.* v. *United States*, cert. granted, No. 81-1181 (Apr. 5, 1982). The petitioner in *Lockheed* has urged that the holding in *Weyerhaeuser* extends to all third-party claims under the Federal Tort Claims Act (81-1181 Pet. Br. 31-34). As respondent correctly notes (Br. in Opp.

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supra, 372 U.S. at 602-603. But reliance on that argument here not only ignores the critical differences already noted between *Weyerhaeuser* and *Stencel Aero*; it also elevates form over substance in an area where it is least appropriate. The damages at issue resulted from negligence claims filed by servicemen against Ionian Glow; it is clear that those claims could not have been brought directly against the United States (Pet. 3, 6). This Court refused to allow such claims to be brought indirectly against the government in *Stencel Aero*, in part because of its concern not to interfere in an " 'area of governmental activity' " where courts have the " 'le[ast] competence' " (*Rostker* v. *Goldberg*, 453 U.S. 57, 65 (1981), quoting *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973)). That interference (see Pet. 8) is no less tangible when the damages a shipowner collects are denominated part of the government's "direct" liability to a joint tortfeasor than when they are called a "derivative" claim.

14), the government has argued in *Lockheed* that *Weyerhaeuser* does not apply to non-maritime claims; thus, even if one assumed that the Fourth Circuit decided this case correctly, it would not undermine the government's position in *Lockheed*. But disposition of *Lockheed* will almost certainly require this Court to reevaluate its decision to allow apportionment of damages in cases such as *Weyerhaeuser*, and the outcome of the reevaluation could bear appreciably on the application of *Weyerhaeuser* to this case. For the same reason, any analysis of *Weyerhaeuser* in the parties' briefs on the merits in this case could be superseded by this Court's decision in *Lockheed*.

CONCLUSION

The Court should hold the petition in abeyance pending its decision in *Lockheed Aircraft Corp.* v. *United States*, No. 81-1181.

Respectfully submitted.

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